KIRUPANANDAN E MURUGESU

v.

THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL SUIT NO: S6-22-214-2000]
10 SEPTEMBER 2002

CIVIL PROCEDURE: *Writ of summons - Service out of jurisdiction - Whether there was strict compliance with procedure for obtaining leave to issue and serve writ out of jurisdiction - Civil Procedure Rules 1999 [UK], r. 6.4(4) - Rules of the High Court 1980, O. 11*

This was an appeal by the defendant against the decision of the learned senior assistant registrar dismissing the defendant's application to set aside the plaintiff's writ of summons which was served out of jurisdiction, on the grounds that the plaintiff had failed to comply with relevant provisions of the Rules of the High Court 1980 ('RHC') in the issuance of the said cause papers and in obtaining the said orders. The plaintiff had caused to be served on the defendant the writ of summons notice which was to be served out of jurisdiction and the amended statement of claim by enclosing the same in a white A4-sized envelope simply bearing the name and address of the defendant, and leaving the envelope on the reception counter of the defendant's office in the United Kingdom.

Held:

[1] It was essential that the plaintiff, in making such an application, comply very strictly with the procedure for obtaining leave to issue and serve a writ out of jurisdiction. However, scrutiny of the steps taken by the plaintiff revealed clearly that the plaintiff had failed to comply with the procedures. Firstly, the issuance of the writ of summons by the plaintiff before obtaining leave was not in order; it was *void ab initio.* Since the writ was issued unlawfully, the amendment made to the writ would also have been unlawful. Therefore, without a writ properly issued the plaintiff had no lawful action in court. Secondly, the delivery of the service of the writ on the defendant was not in conformity with the requirement of r. 6.4(4) of the Civil Procedure Rules 1999 of England as the plaintiff failed to serve it on a person holding a senior position in the defendant's company but had instead merely left it at the reception counter of the front office of the defendant's office. Finally, the plaintiff failed to serve a notice of the

writ on the defendant as required by O. 11 of the RHC. The only documents that the plaintiff served on the defendant were the writ of summons notice and the amended statement of claim. The failure to serve the notice of the writ on the defendant was fatal. (pp 529 f & 530 g)

[Defendant's appeal allowed; plaintiff's appeal against senior assistant registrar's decision allowing defendant's application for a stay of proceedings dismissed.]

Case(s) referred to:
Afro Continental Nigeria Ltd v. Meridian Shipping Co SA [1982] 2 Lloyd's 241 ***(foll)***
Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd [1992] 2 CLJ 1531; [1992] 1 CLJ (Rep) 310 SC ***(foll)***
Fook Lee Bros v. Consevator of Forests [1970] 2 MLJ 60 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 6(1), O. 11 r. 1(1)(g), O. 20 r. 1

Civil Procedure Rules 1999 [UK], r. 6.4(4)

For the plaintiff - Arham Rahimy Hariri; M/s Kumar, Jaspal, Quah & Aishah
For the defendant - Kumar Kanagasingam (Azlan Sulaiman); M/s Allen & Gledhill

Reported by Suresh Nathan

JUDGMENT

Azmel Maamor J:

Defendant's Appeal
Under encl. 23 the defendant had applied before the learned Senior Assistant Registrar, for the following prayers:

1. That the Writ of Summons dated 24th March 2000 be set aside;
2. That the Writ of Summons Notice of which to be Served Out of Jurisdiction dated 24th March 2000 be set aside;
3. That the Service of the Writ of Summons Notice of which is to be served Out of Jurisdiction dated 24th March 2000 and Amended Statement of Claims dated 13th June 2000 on the Defendant be set aside;
4. That the Order dated 12th April 2000 giving leave to the Plaintiff to issue the Writ of Summons dated 24th March 2000 out of jurisdiction to the Defendant be set aside and/or discharged.

The grounds given by the defendant for making such an application were that the plaintiff had failed to comply with relevant provisions of the Rules of the High Court 1980 in the issuance of the said cause papers and/or in obtaining the said orders.

After having heard arguments from counsels from both sides the learned Senior Assistant Registrar dismissed the defendant's application. Being dissatisfied with the learned SAR's decision the defendant now appealed to the judge in chambers (encl. 27).

Briefly the background of the steps taken by the plaintiff in this action are as follows. On 24 March 2000 the plaintiff filed a writ of summons together with a statement of claim indorsed thereon against the defendant whose address as stated in the writ was in the United Kingdom pursuant to O. 6 of the Rules of the High Court 1980 (encl. 1) and simultaneously filed a summons in chambers *ex parte* (encl. 3), pursuant to O. 6 r. 6(1) for leave to issue the writ of summons against the defendant. The plaintiff's affidavit in support was filed under encl. 2. Leave to issue writ against the defendant was granted on 12 April 2000 (encl. 6).

On 21 April 2000 the plaintiff filed another summons in chambers *ex parte*, (encl. 5) pursuant to O. 11 r. 1(1)(g) for leave to serve the writ on the defendant out of jurisdiction and the plaintiffs supporting affidavit was filed in encl. 4. The leave to serve the writ on the defendant out of jurisdiction was obtained on 3 May 2000 (encl. 8).

Subsequently on 13 June 2000 the plaintiff applied to amend the statement of claim (encl. 7). On 7 July 2000 the plaintiff filed and caused the court to seal a notice of writ of summons to be served out of jurisdiction (encl. 9). On 24 July 2000 the plaintiff filed a request for service of document abroad pursuant to O. 11 r. 6 (encl. 10). In encl. 11 the plaintiff applied to amend the writ pursuant to O. 20 r. 1 which writ now entitled "writ of summons notice of which is to be served out of jurisdiction".

The plaintiff then caused to be served on the defendant the writ of summons notice of which is to be served out of jurisdiction dated 24 March 2000 (encl. 11) and the amended statement of claim dated 13 June 2000, (encl. 7) by enclosing the same in a white A4-sized envelope simply bearing the name and address of the defendant and leaving the envelope on the reception counter of the defendant's office at 29, Lincoln's Inn Fields, London WC2A 3EE, United Kingdom on 23 February 2001 at about 2.40pm.

At the outset it cannot be disputed that the jurisdiction to issue and serve a writ out of jurisdiction is an exercise of a sovereignty within the country in which service is to be effected. As such strict compliance with the rules of procedure for issuing and serving the writ must be observed.

This requirement had been clearly reflected in the judgment of Lord Denning MR in the case of *Afro Continental Nigeria Ltd v. Meridian Shipping Co SA* [1982] 2 Lloyd's 241 where he said:

> As I have always understood it, service of a writ out of jurisdiction is an exercise of a sovereignty within the country in which service is affected. It can only be done with the consent of that country.

In the Malaysian case of *Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146 Peh Swee Chin SCJ in delivering the decision of the Federal Court and endorsing the principle stated by Lord Denning *(supra)* said:

> The rationale behind this prescribed method of service is of course that our courts do not exercise their judicial power beyond their territorial limits, and further service of judicial process in a foreign country to use the grave words of Lord Denning in *Afro Continental Nigera Ltd. v. Meridian Shipping Co.* SA is an exercise of sovereignty in that country, which can only be done with the consent of that country. Scrutton LJ in *Vaudrey v. Nathan* when advising circumspection in exercising power to allow service out of jurisdiction, opined that in some countries service out of jurisdiction to be effected there was looked upon with great disfavour.

Based on the above principle and observations it was therefore essential that a plaintiff in making such application must comply very strictly with the procedure for obtaining leave to issue and serve a writ out of jurisdiction.

After having scrutinised the steps taken by the plaintiff in this action it was revealed clearly that the plaintiff had failed to comply with the laid out procedures.

Firstly, the plaintiff had filed the writ before leave was granted. In this case the plaintiff began his action by filing the writ of summons. This is not in compliance with the laid out rules. The first step that the plaintiff should take was to apply for leave to issue the writ. Therefore the issuance of the writ of summons (encl. 1) before obtaining leave was not in order. It was *void ab initio*. There was no application by the plaintiff to withdraw the writ. The plaintiff just proceeded to take further steps as if the writ had been properly filed and issued. In my view the proper thing that the plaintiff should have done was to withdraw the writ, and then apply for leave to issue the writ. Because the writ was issued unlawfully the amendment made to the writ would

also be unlawful. Therefore without a writ properly issued the plaintiff had no lawful action in court. On this ground alone the defendant's application should be allowed.

Secondly, the delivery of the service of the writ on the defendant was not in conformity with the requirement of r. 6.4(4) of the Civil Procedure Rules 1999 of England which states:

> A document is served personally on a company or other corporation by leaving it with a person holding a senior position with the company or corporation.

"A person holding a senior position" is defined under the said Civil Procedure Rules 1999 of England as:

> in respect of a registered company or corporation, a director, the treasurer, secretary, chief executive, manager or other officer of the company or corporation.

In this case it was not disputed that the defendant was a corporate body. As such the service of the writ must be in accordance with r. 6.4(4) of the Civil Procedure Rules 1999 of England. However, the plaintiff failed to comply with the procedure of effecting service on the defendant. What the plaintiff's process server did was merely leaving the white A4-sized envelope bearing only the name and address of the defendant at the reception counter of the front office of the defendant's office. Serving the document in such manner cannot be considered to having it properly served on "a person holding a senior position" with the defendant's company. In the circumstances I therefore conclude that the service of the said writ on the defendant was bad in law.

Finally, as alleged by the defendant and had not been challenged by the plaintiff, the plaintiff failed to serve a notice of the writ on the defendant as required by O. 11 of the Rules of the High Court. The only documents that the plaintiff served on the defendant were the writ of summons notice (encl. 11) and the amended statement of claim (encl, 9). The failure to serve the notice of the writ on the defendant would be fatal. (See *Fook Lee Bros v. Consevator of Forests* [1970] 2 MLJ 60).

In the light of the whole circumstances of this case and for the reasons as I have stated above I allowed the defendant's appeal with costs.

Plaintiff's Appeal

Under encl. 29 the defendant had applied before the learned Senior Assistant Registrar for a stay of proceedings until the outcome of their appeal under encl. 27. The learned Senior Assistant Registrar allowed the defendant's application. However, the plaintiff, being dissatisfied with the ruling of the learned Senior Assistant Registrar, had lodged an appeal. (encl. 34).

This appeal was heard before me after I have heard the defendant's appeal under encl. 27. I have allowed the defendant's appeal for the reasons as I have stated above. In the light of my decision in respect of the defendant's appeal under encl. 27 it would be most ridiculous if I were to decide not to grant a stay of further proceedings especially so when the appeal is made by the plaintiff. In addition to that I was unable to see any party being prejudiced by granting an order of stay of the proceedings in this case. In the circumstances I dismissed the plaintiff's appeal with costs.